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No. 83-652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PAUL W. PETERSON,
Petitioner-Appellant-Plaintiff,

vs.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,
and
TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
SYSTEM DIVISION NO. 34 and TRANSPORTATION-COMMUNICATIONS
DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE
AND STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES,
Respondents-Appellees-Defendants.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that the failure of a former railroad employee's union to appeal denial of his grievances to the National Railroad Adjustment Board did not constitute a breach of the union's duty of fair representation.

2. Whether the Court of Appeals correctly concluded that absent any issue of material fact showing that the union breached its duty of fair representation and that the breach seriously tainted the arbitral process, an arbitration award under the Railway Labor Act is a final and binding determination which precludes an independent action against the railroad for breach of the collective bargaining agreement.

LIST OF PARTIES

The parties to this action are listed in the caption of the case in this Court.

Respondent Chicago and Eastern Illinois Railroad merged with Missouri Pacific Railroad Company effective October 16, 1976. Missouri Pacific Railroad Company is a wholly-owned subsidiary of Union Pacific Corporation. The following companies are also subsidiaries of Union Pacific Corporation and are thus affiliates of Missouri Pacific Railroad Company:

Union Pacific Railroad Company,
Champlin Petroleum Company,
Rocky Mountain Energy Company,
Upland Industries Corporation.

The following are partially owned subsidiaries of Missouri Pacific Railroad Company:

The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
The Belt Railway of Chicago
Brownsville & Matamoros Bridge Company
Chicago & Western Indiana Railway Company
Galveston, Houston and Henderson Railway Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
The Pueblo Union Depot and Railroad Company
Southern Illinois and Missouri Bridge Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company

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BRIEF FOR RESPONDENT CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY IN OPPOSITION

OPINIONS BELOW

In an unpublished order entered May 10, 1983, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Southern District of Illinois. (Appendix A) On March 10, 1982 the District Court denied Peterson's disqualification and discharge claims against the Railroad and entered judgment for the Railroad and the Union. (Appendix B) The Seventh Circuit entered Judgment on May 10, 1983, (Appendix E), and denied

Peterson's petition for rehearing on July 21, 1983. (Appendix F) The Third Division of the National Railroad Adjustment Board had previously denied Peterson's claims against the Railroad on October 31, 1967, Award Number 15924 (Appendix D), and again, following appeal to and remand by the District Court, on January 11, 1980, Award Number 22697. (Appendix C)

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Sections 3, First (i), (m) and (q) of the Railway Labor Act, 45 U.S.C. §151, *et seq.*, are set forth in Appendix G.

STATEMENT OF THE CASE

Petitioner Paul W. Peterson (Peterson) is a former employee of Respondent Chicago and Eastern Illinois Railroad Company (Railroad), which has been merged with the Missouri Pacific Railroad Company. Following Peterson's disqualification from his position as a telegrapher, and subsequent dismissal from the service of the Railroad, his Union, Respondent Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (Union), initiated claims against the Railroad on Peterson's behalf for reinstatement and back pay. Upon failure to resolve the claims on the property, the Union notified Peterson that it would not handle a further appeal to the National Railroad Adjustment Board (Board). The Board ultimately dismissed the disqualification claim and denied the dismissal claim.

Peterson then brought this action to review the Board's award. He sought to reargue the merits of his two grievances on the ground that the Union had breached its duty of fair representation and the breach seriously tainted the integrity of

the arbitral process. The District Court granted summary judgment for the Union and the Railroad. On appeal, the Seventh Circuit affirmed the decision of the District Court.

Peterson began to work for the Railroad in 1945 as a telegrapher. In 1961 the Railroad assigned him to the first shift telegrapher position at the Railroad's Wansford Yard near Evansville, Indiana. As first shift telegrapher one of Peterson's primary responsibilities was to transmit by telegraph the consist reports[1] of two priority trains to the Railroad's general offices in Chicago. Because of an extremely heavy schedule at the Chicago telegraph office, Peterson was required to complete transmission of the reports early each morning.

From 1962 until December of 1964, Peterson repeatedly delayed transmission of the two consists. Following complaints of delays, the Railroad specifically instructed Peterson to give priority to the reports on several occasions. Finally, on December 22, 1964, Peterson refused outright to send the consist reports for the day. He contended that there was wire trouble. The Railroad checked the wires and determined that the wires were operable but that Peterson was simply refusing to send the information. The Railroad subsequently instructed Peterson to give the information verbally over the phone, but he refused. As a result, the Railroad disqualified Peterson and removed him from the position of first shift telegrapher because of his failure to properly fulfill the duties and responsibilities of the position.

In accordance with the collective bargaining agreement, the Union filed a grievance on Peterson's behalf. In an effort to settle the dispute informally the parties postponed the hearing on the disqualification claim. The Railroad offered in writing to

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[1] A consist report is an itemized description of the cars on a train, listing car numbers, contents, destination, and other data.

give Peterson his job back on the condition that he would properly perform his duties. Peterson rejected the offer. The Railroad then informed Peterson that it would remove the condition from its written offer. Even without the condition to which he objected, Peterson still refused to accept the offer of settlement. After further unsuccessful settlement efforts, a disqualification hearing was held on January 11, 1965. The Railroad, Peterson and Union officials participated in the hearing. The Union represented Peterson at the hearing. Upon review of the hearing transcript the Railroad affirmed Peterson's disqualification.

Thereafter, the Union initiated a grievance on Peterson's behalf seeking reinstatement and back pay. The Railroad denied the claim. The Union appealed, and the Railroad again denied the claim. In May, 1965 the Union informed Peterson that the disqualification claim lacked sufficient merit for submission to the Board. The Union recommended that Peterson seek leniency or attempt settlement with the Railroad.

During the pendency of Peterson's disqualification grievance, the Railroad reminded Peterson on several occasions of his obligation to perform service in accordance with his seniority. Peterson replied that he did not want to work and did not feel up to working. The Railroad then instructed Peterson to report for work or provide evidence supporting his contention of illness. Peterson ignored the instruction without submitting any medical evidence of his physical status. The Union warned Peterson on several occasions to produce evidence of his illness or else the Railroad would charge him with being absent without leave. Subsequently, the Railroad cited Peterson for violation of the collective bargaining agreement for failure to report to work as instructed.

Peterson represented himself at the dismissal hearing in April of 1965. During the hearing, he admitted that he was never too ill to work but said he simply had no interest or intention of

working any job other than first shift telegrapher at Wansford Yard. Peterson further admitted that the Railroad had no alternative but to dismiss him because he would not work.

As a result of the facts developed during the investigation, the Railroad dismissed Peterson for failure to report to work. In May, 1965 the Union initiated a second grievance on behalf of Peterson seeking reinstatement and back pay for dismissal. The dismissal claim progressed in the usual manner to the highest designated officer of the Railroad. The Railroad finally declined the claim in August, 1965.

In January, 1966 the Union advised Peterson that it would not handle his appeal to the Board but that he could personally submit his grievance to the Board on or before May 10, 1966. The Union based its decision not to handle the appeal upon its review of the evidence and conclusion that Peterson's grievance lacked merit.

The collective bargaining agreement between the Union and the Railroad required Peterson or the Union to appeal the grievances to the Board within nine months of the date of the letter of declination by the highest designated officer of the Railroad. Under this agreement the deadline for filing an appeal from the disqualification was November 16, 1965 and the deadline for filing an appeal from the dismissal was May 10, 1966.

On May 5, 1966 Peterson himself appealed both claims to the Third Division of the Board. On October 31, 1967 the Third Division rendered Award 15924, which dismissed Peterson's disqualification claim as untimely. The Third Division denied Peterson's dismissal claim on the merits. The Third Division found that in dismissing Peterson the Railroad neither acted unreasonably under the circumstances nor violated any provisions of the collective bargaining agreement.

On July 11, 1968 Peterson filed suit in the United States Federal District Court for the Eastern District of Illinois, seek-

ing judicial review of the October, 1967 Award. By leave of Court, he added the Union as a defendant. Peterson's first amended petition sought judicial review of the October, 1967 Award and relief against the Union for negligent representation and for breach of duty of fair representation for refusing to handle his claims before the Board. Peterson also sought relief against the Railroad for breach of contract.

On the Union's motion and over the Railroad's objection, in November, 1975 the Court allowed realignment of the Union as co-petitioner with Peterson on the single question concerning review of the October, 1967 Award. Following a two day trial in December, 1975, the Court set aside the October, 1967 Award and remanded both grievances to the Board for a full hearing on the merits.

On January 11, 1980 the Board rendered its second Award, Number 22697. Based upon oral argument, written submissions and a 791 page record, the Board found that the Railroad had substantial grounds to disqualify Peterson from the position of first shift telegrapher at Wansford Yard and just cause to dismiss him. In denying Peterson's claims the Board concluded that the Railroad had not violated the collective bargaining agreement.

Peterson appealed again to the District Court. The District Court granted summary judgment in favor of both the Railroad and the Union. The Court found that Peterson had presented no genuine issue of material fact or law to justify setting aside the Board's second Award. The Court found that no factual issue existed concerning the Union's alleged breach of duty because the Union had based its refusal to process Peterson's grievances on its conclusion that they lacked merit. On appeal the Seventh Circuit affirmed the District Court's judgment.

THERE ARE NO VALID REASONS FOR GRANTING A WRIT

Nearly twenty years after disqualification and discharge from the Railroad, Peterson petitions for a writ of certiorari in an effort to avoid the finality of an adverse arbitration award rendered under Section 3 of the Railway Labor Act. 45 U.S.C. §153. He essentially seeks to relitigate the merits of his grievances against the Railroad before a jury by arguing that he has been erroneously deprived of a fair hearing.

I.

The Decision Below Does Not Deprive Peterson Of A Fair Hearing But Simply Reaffirms The Final And Binding Effect Of An Award Of The Adjustment Board Under Section 3 Of The Railway Labor Act

One of the primary purposes of the Railway Labor Act, 45 U.S.C. §151, *et seq.*, is to avoid interruptions to commerce caused by strikes and other labor disputes. *Union Pacific R.R. Co.* v. *Price,* 360 U.S. 601, 609; 79 S.Ct. 1351, 1356 (1959). To accomplish this purpose, the Act establishes a procedure for resolving disputes between a railroad and its employees. Although the Act does not label this type of dispute, the industry and the courts commonly apply the term "minor dispute" to such disputes.[2] The statutory definition for such minor disputes appears in Section 3 of the Act, which covers disputes "between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." 45 U.S.C. §153, First (i).

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[2] By contrast, "major disputes" under Section 6 of the Act arise from efforts to establish a new collective bargaining agreement or to change an existing agreement. 45 U.S.C. §156.

In *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723; 65 S.Ct. 1282, 1290 (1945), the Court described this class of disputes:

> The second class [minor disputes], however, contemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective bargaining agreement . . . . In either case the claim is to rights accrued, not merely to have new ones created for the future.

Thus, minor disputes are controversies over the meaning of an existing collective bargaining agreement and generally involve only one employee in a particular fact situation. *Brotherhood of R.R. Trainmen* v. *Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 33; 77 S.Ct. 635, 637 (1957).

The importance of the minor dispute definition concerns the procedures required under the Railway Labor Act to resolve that type of dispute. After attempts at negotiations with the highest designated officer of the railroad fail, either party may refer a minor dispute to the National Railroad Adjustment Board. 45 U.S.C. §153, First (i).

> Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees 'growing out of grievances or out of the interpretation or application of agreements'. . . .

Slocum v. *Delaware L. & W. R.R. Co.*, 339 U.S. 239, 240; 70 S.Ct. 577, 577-578 (1950).

The jurisdiction of the Board to adjust or arbitrate minor disputes is exclusive. *Slocum* v. *Delaware L. & W. R.R. Co.*, 339 U.S. 239, 244; 70 S.Ct. 577, 579-580 (1950), *Union Pacific R.R. Co.* v. *Sheehan*, 439 U.S. 89; 99 S.Ct. 399 (1978). The "[p]rovision for arbitration of a . . . minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act *compels* the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act." *Andrews* v. *Louisville & N.R. Co.*, 406 U.S. 320, 322; 92 S.Ct. 1562, 1564 (1972). [emphasis added]

Once the Board renders a decision, its award, the Act provides that such awards "shall be final and binding upon both parties to the dispute." 45 U.S.C. §153, First (m). Thus a decision by the Board on the merits forecloses later litigation in the courts. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 608; 79 S.Ct. 1351, 1355 (1959).

The underlying theory for this principal of finality is succinctly stated in *Gunther* v. *San Diego and Arizona Eastern Ry.*, 382 U.S. 257, 263-264; 86 S.Ct. 368, 372 (1965):

> This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. . . [P]rior decisions of this Court had made it clear that the Adjustment Board provisions were to be considered as. . . the complete and final means for settling minor disputes. . . .

Similarly, in *Union Pacific R.R. Co.* v. *Sheehan*, 439 U.S. 89, 94; 99 S.Ct. 399, 402 (1978) the court stated:

> In enacting [the Railway Labor Act], Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpreta-

> tion of collective bargaining agreements...Congress considered it essential to keep so-called 'minor' disputes within the Adjustment Board and out of the courts. [Citations omitted] The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of its determinations.

In keeping with this overall policy, the Act does not allow a court to redetermine the merits of the grievance but instead allows only a limited judicial review of Board awards. Indeed, the range of review has been described as among the narrowest known to law. *Del Casal* v. *Eastern Airlines, Inc.*, 634 F.2d 295, 298 (5th Cir. 1981). Upon review, findings and orders of the Board are conclusive on the parties and may only be set aside on one of the three specific grounds set forth in 45 U.S.C. §153, First (q):

> On such review, the findings and order of the division shall be conclusive on the parties, except that an order of the division [of the Adjustment Board] may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this [Act], for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or fraud or corruption by a member of the division making the order.

In accordance with the limited ground for review, the District Court examined the evidence to determine whether Peterson was denied a fair hearing on both of his claims against the Railroad.[3] The District Court found more than enough evidence to show a foundation in reason and fact for the Board's ruling.

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[3] Denial of due process falls within exception number two of 45 U.S.C. §153 (q), exceeding the Board's jurisdiction, and has been described as an award that is wholly baseless and without reason and foundation. *Kotakis* v. *Elgin, Joliet & Eastern Ry. Co.*, 520 F.2d 570, 574-575 (7th Cir.) *cert. denied*, 423 U.S. 1016 (1975).

(Appendix B, p. A-14) Consequently, the District Court granted summary judgment for the Railroad, in part, on the basis that the findings and order of the Board were conclusive, leaving the Court without jurisdiction to re-weigh the evidence.[4]

Despite the fact that Peterson has fully litigated the merits of his disqualification and discharge claims against the Railroad before the Board,[5] he again attempts in his petition here to reargue the facts.

> [T]he facts considered in the light most favorable to Peterson regarding the Railroad's wrongful disqualification of Peterson from his first shift telegrapher's position and the Railroad's subsequent wrongful discharge of petitioner from employment, clearly precludes summary judgment on these two issues. . . [and] . . . present[s] a jury question.

(Peterson's petition, p.25)

Peterson seeks to convince the Court he has been denied a fair hearing by simply reasoning that a jury could possibly reach a result contrary to the Board. He insists that a factual determination by a jury on his wrongful disqualification and discharge claims is the sole means of providing him with a fair hearing.

Peterson has completely ignored the unequivocal terms as well as the obvious purpose of Section 3 of the Act. Peterson's claims were disputes with the Railroad involving the application of the collective bargaining agreement. The claims were proper-

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[4] On appeal the Seventh Circuit concluded that Peterson did not allege statutory grounds for judicial review of the Board's Award (Appendix A, p. A-1).

[5] In fact, the Board has ruled on the merits of Peterson's grievances on two occasions. The contention that the first Award which dismissed his disqualification claim as untimely is not a ruling on the merits is unfounded. *Union Pacific R.R. Co.* v. *Sheehan*, 439 U.S. 89; 99 S.Ct. 399 (1978)

ly submitted to the Board. The Board, created pursuant to the Act for the express purpose of hearing and resolving such matters, was the exclusive tribunal to review the evidence and determine the merits of Peterson's grievances. After reviewing the extensive record and listening to oral argument, at which Peterson was represented by counsel of his choice, the Board concluded that the Railroad had reasonable grounds for disqualifying and dismissing Peterson and that the Railroad had not violated the collective bargaining agreement. Once decided, the findings and order of the Board were final and binding on the parties and not subject to an independent determination by a jury.

Peterson's claims against the Railroad for wrongful disqualification and wrongful discharge have been finally, completely and irrevocably settled by the Board. Absent a statutory ground for review of the Board's Award, he is entitled to nothing more. This Court must afford the decision of the Board and finality Congress intended and deny his petition for writ of certiorari.

II.

The Decision Below Is Squarely In Line With Standards Outlined By This Court That Peterson May Not Avoid The Finality Of The Award And Seek Relief Against The Railroad Absent An Initial Showing That His Union Breached Its Duty Of Fair Representation And The Breach Seriously Tainted The Arbitral Process

In a further attempt to avoid the finality of the Board's adverse decision, Peterson argues that the Union breached its duty of fair representation which seriously tainted the arbitral process. He cites *Hines* v. *Anchor Motot Freight, Inc.*, 424 U.S. 554; 96 S.Ct. 1048 (1976) and *Vaca* v. *Sipes*, 386 U.S. 171; 87 S.Ct. 903 (1967) for the proposition that an otherwise binding arbitration decision may be invalidated with respect to the employer as well as the union, provided the employee establishes the union's breach of duty tainted the arbitral pro-

cess. On this point, he concludes that the District Court and the Court of Appeals erred by not considering his claim against the Union and his claims against the Railroad simultaneously.

Contrary to Peterson's theory, in order for him to avoid the finality of the Board's decision, he is first required to prevail on the representation claim against the Union. *United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56, 62, 66-67; 101 S.Ct. 1559, 1564, 1565-1566 (1981); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554, 572; 96 S.Ct. 1048, 1060 (1976). In other words, a breach of the Union's duty of fair representation is a necessary element of his action against the Railroad for wrongful disqualification and wrongful discharge. *Cote* v. *Eagle Stores, Inc.,* 688 F.2d 32, 35 (7th Cir. 1982).

Accordingly, Peterson's failure to prove any breach of duty on the part of the Union clearly forecloses relitigating his claims against the Railroad.

CONCLUSION

Peterson's petition is merely another attempt to bypass the adverse effect of the Board's binding Award. He has presented no valid reason whatsoever for granting a writ. The decision below clearly does not deprive Peterson of a fair hearing. Instead it simply reaffirms the final and binding effect of an award of the Board under Section 3 of the Act. 45 U.S.C. §153. Moreover, the decision below is squarely in line with standards outlined by this Court. Peterson may not avoid the finality of the Award and seek relief against the Railroad absent an initial showing that his Union breached its duty of fair representation and the breach seriously tainted the arbitral process.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
(Argued: January 11, 1983)

May 10, 1983

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER,, Circuit Judge

Paul W. Peterson,

Petitioner-plaintiff-appellant,

No. 82-1895

vs.

Chicago and Eastern Illinois Railroad Company,
Transportation-Communication Employees Union,
System Division No. 34 and
Transportation-Communications Division, Brotherhood of
Railway, Airline and Steamship Clerks, Freight Handlers,
Express and Station Employees,

Respondent-defendants-appellees.

Appeal from the United States District Court
for the Southern District of Illinois.

No. CV 68-99

ORDER

Plaintiff-appellant, Paul W. Peterson, is a former employee of defendant, Chicago and Eastern Illinois Railroad Co. (the "Railroad"), now merged with the Missouri Pacific Railroad Company. after being disqualified from his position as first-shift telegrapher and subsequently discharged by the railroad, he grieved, appealed and ultimately lost his claim for reinstatement and back pay. Peterson then asked the district court to reopen and review the results of the arbitration proceeding, on grounds that his union, now renamed and merged with the defendant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (the "Union"), had breached its duty of fair representation and thus seriously undermined the arbitral process. The district court granted summary judgment for the defendants. We affirm.

I.

The plaintiff-appellant, Paul W. Peterson, was employed as a telegrapher by the defendant railroad at the Wansford Yard near Evansville, Indiana from 1945 to 1965. At the end of 1964, he was disqualified from the post of first-shift operator, on grounds that he had failed properly to fulfill the duties of the position by repeatedly delaying transmission of consist reports to the Chicago office. A hearing on the disqualification was scheduled for January 4, 1965, but then postponed in an attempt at settlement. The railroad offered Peterson a letter agreement which would give him the right to return to his position, on condition that the railroad had the right to remove him if his performance continued to be unsatisfactory. He refused to sign the proposed agreement. After the failure of these settlement efforts, a hearing was held on January 11, 1965, at which Peterson was represented by the Union. His disqualification was nonetheless affirmed by the railroad. Thereafter, the Union filed a grievance, which was denied; the denial was appealed,

but the grievance was again denied. In April of 1965, the Union notified Peterson that it had decided not to submit his grievance to the arbitration process provided by the Railway Labor Act, and advised him to settle with the railroad.

After being disqualified from his position as first-shift operator, Peterson was instructed by the railroad to perform other duties. He refused. He did not return to work, despite several instructions to do so and without submitting medical evidence of his inability to work. Consequently, a dismissal hearing took place on April 9, 1965. Mr. Peterson represented himself at this hearing, apparently not having asked the Union to represent him. On April 15, 1965 he was dismissed for failure to report to work. In May 1965, the Union grieved his dismissal, seeking reinstatement and back pay for him. The grievance was not resolved, however, through the internal grievance procedures; and on January 28, 1966, the Union told Peterson that the Union had decided not to appeal his claim to the Railroad Adjustment Board ("Board"), although he could do so individually by May 8, 1966. The Union's decision was based on its conclusion that Peterson's grievance lacked merit.

The Railway Labor Act provides that disputes which are not resolved between carriers and their employees (or employees' representative) may be referred to the Board for arbitration. *See* 45 U.S.C. §§ 152, 153 (1976). If the employee's union does not pursue the grievance on his behalf, moreover, the employee is free to prosecute it on his own. *See* 45 U.S.C. § 153 First(i); *Essary v. Chicago & N.W. Transport Co.*, 618 F.2d 13, 17 n.6 (7th Cir. 1980). However, the collective bargaining contract governing Peterson at that time required that any appeal to the Board be initiated by the employee or his representative within nine months of denial of the grievance by the carrier. Thus, although May 8, 1966, would have been timely for an appeal of the dismissal, Peterson's disqualification grievance had to have been appealed by November 16, 1965. On May 5, 1966, Peterson appealed the denial of both grievances to the Board. The

disqualification grievance was denied on the grounds that the appeal was not timely filed, and the dismissal grievance was denied on the merits.

On July 11, 1968, Peterson appealed these denials to the district court, and in May 1971 amended his appeal to include a duty of fair representation suit against the Union. In an order of May 4, 1976, the district court ordered the case remanded to the Board for a hearing of both claims on their merits, realigning the Union as a party plaintiff. On January 11, 1980, the Board denied both the disqualification and the dismissal grievances on their merits. Peterson then appealed again to the district court, which entered summary judgment against him.

II.

In his appeal, Peterson attempts, first, to reargue to us the merits of his two grievances. However, in the absence of the statutory grounds for judicial review of an Adjustment Board award (none of which has been alleged here, *see* 45 U.S.C. § 153 First(q), such awards are to be considered final and binding. 45 U.S.C. § 153 First(m); *Kotakis v. Elgin, Joliet & Eastern Railway*, 520 F.2d 570 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975). A court will reweigh the outcome of a final and binding arbitration only if the arbitral process has been tainted, or seriously undermined, by union conduct which is "arbitrary, discriminatory, or in bad faith." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 566-71 (1976); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Baldini v. Local 1095, UAW*, 581 F.2d 145, 150 (7th Cir. 1978).

Thus the only way for Peterson to escape the finality of the arbitration award in this case is to show that his Union breached its duty of fair representation in such a way as to taint the arbitral process. In this respect, Peterson argues, variously, that the Union deceived him about the deadline for an appeal to the Board, refused to take his appeal in order to cover up its earlier

mistake, changed its position at several times about his claim (for example, by first supporting his refusal to sign the letter agreement of January 4, 1965, and later advising him to sign it) and actively opposed his claim at various points — by advising him to report to work rather than supporting his refusal to do so, by refusing to represent him on remand although realigned as a plaintiff, and by various kinds of conduct during the defense of the duty of fair representation suit. Most of these claims are wholly devoid of merit. As the Supreme Court emphasized in *Vaca v. Sipes,* 386 U.S. at 191-93, unions are not required to press each grievance to arbitration; rather, they are expected to evaluate and screen grievances based upon assessments of their merit. The Union here clearly had the right to decide not to pursue Peterson's grievance when it decided in good faith that the grievance was not a meritorious one. After the Union had made that decision, its inactivity on his behalf was to be expected. Moreover, once sued for breach of the duty of fair representation, adversary behavior by the Union in its own defense surely cannot be condemned if entered into in good faith.

The only colorable claim that the Union breached its duty to Peterson is based on the Union's failure to inform him of the correct deadline for an appeal of the disqualification grievance. However, this failure amounts at most to negligence on the part of the Union, which does not suffice to support a breach of the duty of fair representation in this circuit. *Graf v. Elgin, Joliet & Eastern Railway,* No. 82-1864, slip op. at 11 (7th Cir. Jan. 7, 1983). Moreover, Peterson's disqualification grievance, although it was initially dismissed by the Board as untimely, was ultimately remanded by the district court for rehearing; the Board then considered it upon the merits and denied it. Thus the mistaken information which the Union conveyed to Peterson about the period for an appeal cannot be said in any way to have tainted the arbitral process.

In sum, plaintiff-appellant has failed to show that there are any issues of material fact which might be resolved at trial showing that the Union breached its duty to him, thus lifting the bar of a final and binding arbitration award. Under such circumstances, the defendant's motion for summary judgment was properly granted. The order of the district court is therefore hereby AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF ILLINOIS

Civil Action File No. 68-99

Paul W. Peterson,

Petitioner,

vs.

Chicago and Eastern Illinois Railroad Company, et al.,

Defendants.

JUDGMENT

This action came on for (hearing) before the Court, The Honorable James L. Foreman, Chief U.S. District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is rendered in favor of the defendants and against the plaintiff to the Order of this Court on March 10, 1982.

Dated at East St. Louis, Illinois, this 10th day of March, 1982.

A. MARVIN HELART
Clerk of Court

/s/ THERESA M. WARD
Deputy U.S. Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CIVIL NO. 68-99

Paul W. Peterson,

Petitioner,

vs.

Chicago and Eastern Illinois Railroad Company,

Respondent.

Paul W. Peterson,

Plaintiff,

vs.

Transportation-Communications Employees Union, etc., et al.,

Defendants.

ORDER

FOREMAN, Chief Judge:

Before the Court are four motions: (1) Motion for Summary Judgment or in the Alternative Answering Supplemental Count I, filed by the Missouri Pacific Railroad Company, successor by merger to named respondent-defendant Chicago & Eastern Illinois Railroad Company (C&EI), on August 10, 1981; (2) Motion (to file additional counts to supplemental petition), filed by plaintiff on August 17, 1981; (3) Motion for Summary Judgment on Counts II, III, IV and V of plaintiff's First Amended Petition and Counts II, III and IV of the Amended, Supplemental Petition, filed by defendant Transportation-

Communications Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Emloyees (BRAC) on September 9, 1981; and (4) Motion to Dismiss the Amended, Supplemental Petition, filed by BRAC on September 9, 1981.

I. Brief History

Because this litigation spans over a decade and sports a complex procedural pedigree, a brief history is in order. Petitioner-plaintiff Peterson ("plaintiff") was "disqualified" from his position as a first shift telegrapher at the Wansford Yard of the Chicago & Eastern Illinois Railroad Company (C&EI), near Evansville, Indiana, on December 23, 1964. Various discussions between union representatives and management followed, culminating in a denial of his claim by the highest responsible company official. In the meantime, because plaintiff refused to return to another job with the railroad under conditions negotiated for him by the union (which he deemed unacceptable) and did not justify his absence with a medical reason, the railroad dismissed him on April 15, 1965. After more discussion and an affirmance of the dismissal by railroad General Manager Vierling on August 10, 1965, the union, per Mr. General Chairman Hayes, informed plaintiff on January 28, 1966 that the union would no longer handle his case, but that he could refer it to the National Railroad Adjustment Board ("the Board"). The union reached this decision apparently because it felt the claim would be unsuccessful before the Board.

On May 5, 1966, plaintiff referred his disqualification and dismissal to the Board. He relied in filing on the union's advice that to be timely he must file before May 8, 1966. On October 31, 1967, the Board entered its Award No. 15924 in the appeal. The board denied plaintiff's disqualification claim for failure to file within the nine month time limit afforded by the collective bargaining agreement, and denied the claim for wrongful dismissal on the merits. The Board concluded that there was no

support for the allegation "that Carrier has abused its authority by acting in an arbitrary, capricious or discriminatory manner."

Dissatisfied with this result, plaintiff filed a petition for judicial review in this Court on July 11, 1968,[1] which allows for review of Board decisions, but also provides that findings of the Board are conclusive on the parties. Since the only exceptions to this conclusivity provision are (1) failure of the Board to comply with the requirements of the statute, (2) failure of the order to remain confined within the Board's jurisdiction and (3) fraud or corruption of a Board member, plaintiff alleged that the Board exceeded its jurisdiction when it deprived him of his due process rights and exceeded its statutory authority. On April 22, 1969, the Court allowed plaintiff to amend his complaint and add the union and the railroad as parties defendant.

On May 6, 1971, the plaintiff filed his First Amended Petition, consisting of five counts. The First Amended Petition sought the following relief: (1) Count I sought administrative review of the Board decision of October 31, 1967, pursuant to 45 U.S.C. § 153(q); (2) Count II, directed against the Transportation-Communication Employees Union, System Division No. 34, plaintiff's union at the time of discharge and predecessor of BRAC, sought relief for breach of the duty of fair representation; (3) Count III sought relief on the same grounds as Count II, but was leveled at both the union and the railroad; (4) Count IV sought relief on the same grounds as Count II, but was directed at BRAC, the successor union; and (5) Count V also reiterated Count II, but sought relief from both BRAC and the railroad.

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[1] Plaintiff filed his original petition in the old Eastern District of Illinois. By order of Congress dated October 2, 1978, the case came within the jurisdiction of the new Southern District of Illinois, effective March 31, 1979.

In the years between 1971 and 1976, the parties presented the Court with motions, including those for summary judgment and for dismissal, which the Court denied. The Court scheduled final pre-trial proceedings for November 20, 1975, and trial for December 8. At the scheduled pre-trial, the Court ordered, by suggestion of the union, that it be realligned as a plaintiff as to Count I, only. The union thought that the litigation could be resolved best by putting plaintiff's entire claim, both disqualification and discharge, before the Board once again for full determination on the merits of both. Plaintiff, who sought by virtue of Count I the same thing, objected to the realignment. A two day trial was held on December 10 and 18, 1975, on Count I only. On May 4, 1976, this Court remanded the claim to the Board, on grounds that the arbitrary and uncertain appeal procedures rendered Award No. 15924 "arbitrary, capricious, actually and in disputably without foundation in fact or reason and in violation of the statutory requirements of Section 3, First (i) and (m): of 45 U.S.C. §153 First (i) and (m). The Court set aside the award in full and ordered a new hearing on both claims. At the same time the Court stayed proceedings on Counts II and V of the First Amended Petition.

The Board rendered its new decision on January 11, 1980, and delivered it to the Court on January 28, 1980. In Award No. 22697, the Board denied both claims on the merits. The decision was rendered on the basis of a 791-page record which the Board delivered to the Court on April 7, 1980. By order of June 24, 1981, the Court allowed plaintiff to file a Supplemental Count I attacking the new Board decision, since Count I of the First Amended Petition had been rendered nugatory by the May 4, 1976 remand order. The Court lifted the stay on Counts II through V of the First Amended Petition and ordered responsive pleadings. Plaintiff sought on July 27, 1981 to file an additional "amended supplemental petition." This supplemental petition sought relief against BRAC, the railroad, and BRAC and the railroad jointly, for breaches of the duty of fair representation for activities occurring *after* the 1976 remand

order. For the first time, plaintiff included against the railroad allegations of deprivation of third party beneficiary rights vested in him by the collective bargaining agreement. The Court denied this motion on July 29, 1981, for failure to comply with the Local Rules.

Before plaintiff could refile his amended supplemental petition, the C&EI moved for Summary Judgment, on August 10, 1981. A week later, on August 17, 1981, plaintiff moved again to file his amended supplemental petition, this time by moving to file additional counts to the Supplemental Petition already allowed by the Court on June 24, 1981. On September 9, 1981, BRAC moved for Summary Judgment on Counts II, III, IV and V of plaintiff's First Amended Petition and Counts II, III and IV of his Amended, Supplemental Petition. The motions just described are those currently before the Court.

II. Motion (To File Additional Counts to Supplemental Petition)

At the status conference of December 2, 1981, counsel for plaintiff, while arguing his Motion to File Additional Counts to Supplemental Petition, indicated that he did not intend to abandon Counts II through V of his First Amended Petition. This makes good sense, since the allegations of the latter involve acts occurring prior to 1971 and those of the former acts occurring since the remand order of May 4, 1976. Considering the age of this litigation, the fact that both defendants have already responded to the supplemental counts, the liberal amendment standards of Rule 15 and the absence of any prejudice to the defendants, the Court hereby GRANTS plaintiff's motion.

III. C&EI's Motion for Summary Judgment

In its Motion for Summary Judgment, the C&EI argues that the full hearing before the Board on the merits of both claims is the ultimate relief plaintiff has been seeking and, now that it has

been granted, must be affirmed since none of the grounds for reversal are present. It further argues that since summary judgment is proper on Count I, it must be granted on the remaining counts as well. Plaintiff contends that it is apparent from the record that the Board did not confine itself to matters within the scope of its jurisdiction and that plaintiff did not receive a due process hearing, either "on the premises" or before the Board.

The statute allowing review of the Board's decision provides as follows:

> On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside in whole or in part, or remanded to the division to comply with the requirements of this Act, for failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or the corruption by a member of the division making the order.

45 U.S.C. § 153 First(q). As the Supreme Court of the United States has stated, judicial review is limited to three grounds: (1) failure of the Board to comply with the Railway Labor Act; (2) failure of the Board to conform or confine itself to matters within its jurisdiction; and (3) fraud or corruption. *Union Pacific R.R. Co. v. Sheehan,* 439 U.S. 92 (1978). Awards may not be disturbed on the grounds that the Board disregarded evidence, misinterpreted contract provisions or was clearly erroneous. The Seventh Circuit Court of Appeals in *Kotakis v. Elgin, Joliet & Eastern Ry. Co.,* 520 F.2d 570, 574 (7th Cir.), *cert denied,* 423 U.S. 1016 (1975), held that a denial of due process in the hearing can be grounds for reversal of the Board's order. Denial of due process falls under exception number two, exceeding the Board's jurisdiction. Denial of due process in this context is an award "actually and indisputably without foundation in reason or fact," or "wholly baseless and without reason." *ID.* at 574-75.

In his Supplemental Count I, plaintiff does not allege failure of the Board to comply with the Act, nor does he allege corruption or fraud. His attack is solely limited to one based on due process. It seeems fairly clear from plaintiff's arguments that he misunderstands the nature of review under 45 U.S.C. § 153 First(q). He deems it "essential that the record be examined upon which the Board rendered its award in order to determine whether or not it should be set aside or affirmed by this Court." Further,

> [i]t is not a sufficient answer for the Railroad to say, "he had a hearing before the Board." This is not an end-all of the question. Such a philosophy preferring form over substance would legitimatize a miserable charade - announcing to the world that the phrase "due process" is nothing but a hollow sound, and that the constitutional guarantee of due process is nothing but the pious platitude of an empty promise.

Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, August 26, 1981, at 4. Of course, in a limited sense, he is correct. The Court must examine enough in the record to determine whether the award is without foundation in reason or in fact. But, the Court may not, as plaintiff seems to suggest, read the record and weigh the testimony for itself.

The Court has made a review of the 791 page record and has found, to say the very least, more than enough evidence to show that there is foundation in both reason and fact for the Board's decision. Appearing at pages 439 through 497 of the record is a transcript of an investigation hearing held at Chicago Heights on January 11, 1965, for purposes of deciding the disqualification claim. There was ample testimony from Mr. Maddock, Mr. Cable, Mr. Huffaker, Mr. Pickering and Mr. Jett that plaintiff Peterson, whatever his technical telegraphy skills, was not fulfilling properly the duties assisgned to him. Many testified that when Peterson was absent, the work was "cleared" and

completed at an early hour of the morning but that when he was on the job, the work was not finished. The testimony depicts an obstinate man who telegraphers in other stations had difficulty accommodating. Several testified that he was a poor or extremely poor sender. While that may or may not have been entirely true, it was for the Board to decide. At any rate, it is clearly enough to remove this aspect of the award from the wholly without foundation in fact or reason category.

The same is true with respect to the investigation hearing held April 9, 1965 at Danville, Illinois for purposes of deciding the dismissal claim. Mr. Pape testified as to his efforts to contact plaintiff and inform him that he must return to work or provide a valid reason for failure to do so. At page 516 of the record, plaintiff acknowledged that he had received the letters informing him to return to work, but retorted that "any thinking person should know [he] was sick." R.516. When asked for a letter from a doctor, he stated he was "not sick physically - or mentally - just sick at heart . . ." *Id.* He also explicitly stated that he would not return to work on anything other than the C&EI first trick (from which he had been disqualified). Plaintiff did attempt at pages 516-17 to paint a picture that he was being "railroaded," so to speak, by company officials since he had displeased chief Telegrapher Cable with his performance, which suffered from what he felt was a crushing workload at Wansford Yard. Yet, again, weighing these arguments was the Board's task, and not that of this Court. It is more than obvious that the record contained evidence on which to base its January 11, 1980 denial on the dismissal claim which removed the decision from the category of without basis in fact or reason.

The rest of plaintiff's brief offers nothing supportive of its position. Plaintiff argues that the awards are based on facts not in evidence, but never states what those supposed facts are. His seventy-eight page "ExParte Submission," already a part of the Board record, argues that he never received notice of his poor performance or that he should sign up on another work board.

Not only does the above review of the evidence contradict this line of argument, but it demonstrates that plaintiff actually desires that this Court do something the Supreme Court has repeatedly said it may not do, that is, reweigh the evidence. *See, Sheehan, supra,* 439 U.S. at 93. The exclusive, primary jurisdiction of adjustment boards established under the Act to determine the merits of grievances has been long established under federal law. *Slocum v. Delaware Lackawanna & W. R.R.,* 239 U.S. 225 (1950). Congress amended the Act in 1966 to provide flatly that awards of the Board "shall be final and binding," 45 U.S.C. § 153 First (m).

Plaintiff has alleged the existence of no disputed issue of material fact which casts doubt on the validity of this holding. He has only urged this Court to reweigh evidence and second guess the standards employed by the Board in its decision. Accordingly, entry of summary judgment pursuant to Rule 56 is proper on Supplemental Count I.

The C&EI also seeks summary judgment on the remaining counts. Since this issue is intertwined with that of the alleged breach of the union's duty of fair representation, the Court shall consider it with the latter, below.

The C&EI also seeks summary judgment on its "counterclaims." The Court is unable to find in this voluminous file any counterclaims filed by C&EI against the plaintiff or the other defendants (although the two unions involved, T-CEU and BRAC, did file cross-claims against the C&EI on March 1, 1972 and the C&EI answered on August 29, 1972). Accordingly, the C&EI is entitled to nothing on the nonexistent counterclaims.

IV. BRAC's Motion for Summary Judgment on Counts II, III, IV and V of Plaintiff's First Amended Petition and Counts II, III and IV of the Amended, Supplemental Petition

A. Counts II, III, IV and V of Plaintiff's First Amended Complaint.

For purposes of ruling on the summary judgment motion as it relates to these counts, the Court makes the following findings of fact:[1]

1. In Counts II through V of the First Amended Complaint, it is alleged that officials of the Transportation-Communication Employees Union (plaintiff's union representative at the time of the events in question, which was merged into BRAC and ceased to exist in 1969) were guilty of various acts of negligence in representing plaintiff in connection with his claims, and breached its duty of fair representation by "arbitrarily, capriciously and without just reason or "cause" refusing to carry his claims to the Board, and that plaintiff was "wrongfully deprived of an appeal" to the Board on the merits of his claims by reason of the alleged acts and omissions of his union representative. The gravamen of plaintiff's claims against BRAC in all counts is the allegation in paragraph 22 of the First Amended Petition (paragraph 18 of the Amended Supplemental Petition), that, had petitioner's grievances "been processed in a proper manner" by BRAC, the Board would have entered an award in plaintiff's favor on the merits, and would have ordered his reinstatement to his position as first shift telegrapher at Wansford Yard and reimbursed him for all lost wages.

2. As a result of discussions between counsel for the parties and the Court at a pre-trial conference held on November 20, 1975, the Court granted a motion by BRAC to be realigned as co-petitioner with plaintiff on Count I only, ordered that Count I be severed for separate trial, and ordered that the issues with

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[1] In Counts II through V of the First Amended Complaint, Count I for administrative review is incorporated by reference. Inasmuch as the Court has already granted summary judgment on Count I, it will not be considered in the course of this discussion.

regard to Counts II through V pend further action or order of the Court. BRAC, as co-petitioner on Count I, then filed a motion for order remanding proceedings to the Board. In this posture, the cause was heard by the Court on Count I and on the motion for order of remand, and on May 4, 1976, this Court entered an order granting the motion of remand and directing the Board to consider petitioner's claims for both wrongful disqualification and wrongful discharge *de novo*. At that time, proceedings in this case on Counts II through V were stayed.

3. In September 1977, plaintiff initiated a new submission to the Board pursuant to the Court's order of May 1976, on both the disqualification and discharge claims. Both plaintiff and the Railroad filed lengthy ex parte and rebuttal submissions which included extensive excerpts from deposition testimony taken in this action. The carrier and labor representatives on the Board reached deadlock, and a neutral referee was named to determine the issues. Plaintiff was accorded the opportunity to appear before the neutral referee in person and by counsel, pursuant to the order of this Court, and fully availed himself of the opportunity. On January 11, 1980, the referee entered his award, denying both the disqualification and dismissal claims on the merits, as follows:

> The Board finds the carrier had substantial grounds for disqualifying claimant from the position of first shift telegrapher at Wansford Yard. It further finds that claimant's refusal to perform service for the carrier, other than the position from which he had been disqualified, was insubordination and therefore carrier had just cause for dismissing him from its service.

The award further states that, even if the disqualification claim had been meritorious, the wrongful discharge claim would still have been denied because of plaintiff's refusal to return to work and make himself available for service other than in the position from which he had been disqualified:

When carrier directed him to make himself available for service, he was required to do so. Reliance on asserted injustice and impropriety in his disqualification from the first shift telegrapher's position is misplaced. His recourse lay in the grievance procedure, not in self-help.

4. Following receipt of the Board's award of January 11, 1980, plaintiff sought leave of court to file an amended supplemental petition, seeking a further order of remand to the Board. On June 24, 1981, the Court entered an order granting plaintiff's motion for leave to file his petition as a supplemental Count I (Petition for Review). The Court further ordered the secretary of the Board to file a true or certified copy of the entire record of the proceedings for the Board on remand with this Court (which was done on July 20, 1981), ordered the Railroad to file responses to supplemental Count I within twenty days thereafter, and vacated the stay of proceedings on Counts I through V of the First Amended Petition. On July 24, 1981, plaintiff filed a further motion for leave to amend his pleadings to add supplemental Counts II through IV.

5. The affidavit of Dean T. Echols, the man who, in 1965 handled the administrative processing of plaintiff's grievance, establishes that the union refused to process further plaintiff's claims solely based on their opinion that it had no merit and that the Board would find that the C&EI had just reason for discharge.

6. The affidavit of Echols and the letters sent by union president Leighty to General Chairman Hayes, attached to the affidavit as Exhibits A and B, establish that the union president, Mr. Leighty, did not think the claim had merit.

Based on the following facts, BRAC should prevail on its summary judgment motion with respect to Counts II through V.

The elements of the duty have been set forth by the Supreme Court. Under the decisions, a union breaches its duty when its conduct is "arbitrary, discriminatory, or in bad faith, as, for example, when it arbitrarily ignores a meritorious grievance or process[es] it in [a] perfunctory fashion." *IBEW v. Foust*, 442 U.S. 42, 46 (1979); *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). There is no right to have meritless grievances processed, and there is no breach of the duty of fair representation arising from any act or omission to act by a union in connection with such a claim. *Whittier v. Anchor Motor Freight, Inc.* 521 F.2d 1335, 1341 (6th Cir. 1975); *Patterson v. Teamsters*, 405 F.Supp. 980, 987 (S.D. Ill. 1976). As the high court has stated "[i]f an individual employee could compel arbitration of his grievances regardless of its merit, the settlement machinery . . . would be substantially undermined . . ." *Vaca, supra*, 386 U.S. at 191. "The union need not arbitrate every grievance . . . The union has a duty to screen grievances and to arbitrate only those the union believes are meritorious." *Melendy v. United States Postal Serv.*, 589 F.2d 256, 259 (7th Cir. 1978). "Even if an employee claim warrants arbitration, a union may properly reject it unless its action is arbitrary or taken in bad faith." *Moore v. Sunbeam Corp.*, 459 F.2d 811, 820 (7th Cir. 1972).

In this case, BRAC has demonstrated with the Echols affidavit and the attached exhibits that the union refusal to process the claim was based solely on a good faith assessment of its merit. Furthermore, the subsequent denial of plaintiff's claims by the Board and affirmance of that decision by this Court indicate that the claim in fact was meritless. Plaintiff on the other hand, has introduced nothing to controvert these established facts, but instead, relies upon his pleadings. This he may not do successfully for Rule 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in

> this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Fed.R.Civ.P. 56(e). Here, the union has established good faith conduct and the Board, backed by this Court, has determined the grievance to be meritless. Clearly, summary judgment is proper on these Counts.

B. Counts II, III and IV of the Amended Supplemental Petition

For purposes of ruling on the summary judgment motion on Counts II, III and IV of the Amended Supplemental Petition, the Court makes the following findings of fact:

1. Count I of the Amended Supplemental Petition is the same supplemental Count I which plaintiff was permitted to file by the Court's order of June 24, 1981, and seeks no relief against defendant BRAC. Paragraphs 1 through 18 of Counts II, III and IV merely restate the matters alleged in Counts II through V of the First Amended Petition and add nothing further thereto. The matters contained in these paragraphs are subject to the motion of defendant BRAC for summary judgment on Counts II through V of the First Amended Petition. For purposes of this motion, the Court will therefore consider only the allegations of paragraphs 19 through 26 of Count II and in paragraphs 27 through 33 of Counts III and IV of the Amended Supplemental Petition, which relate to matters allegedly occurring during the pendency of this suit.

2. Counts II through IV of the Amended Supplemental Petition seek to assert "further and additional" breaches of duty of fair representation arising from actions by said defendant during the pendency of this lawsuit. Specifically, plaintiff alleges in paragraph 22 of each of said counts that said defendant was guilty of further breaches of its duty of representation by assisting the C&EI in examination of witnesses in depositions

"in an adversary manner against petitioner;" in refusing to appear for and represent petitioner in the proceedings before the National Railroad Adjustment Board (the "Board") on remand; in taking positions "contrary to the best interest of petitioner" with respect to interpretation of the collective bargaining agreement; in disclosing information which the union had received from petitioner and others; and in withholding support and representation from petitioner, "knowing that such withholding would have an adverse effect on petitioner's cause," before the Board.

3. The affidavit of Dean T. Echols, the man who, in 1965 handled the administrative processing of plaintiff's grievance, establishes that the union refused to process further plaintiff's claims solely based on their opinion that it had no merit and that the Board would find that the C&EI had just reason for discharge.

4. The affidavit of Echols and the letters sent by union president Leighty to General Chairman Hayes, attached to the affidavit as Exhibits A and B, establish that the union president, Mr. Leighty, did not think the claim had merit.

Based on the foregoing facts, BRAC should prevail on its summary judgment motion with respect to Counts II through V.

If plaintiff's claims were meritorious, or if the union had acted arbitrarily, discriminatorily or in bad faith, plaintiff might possibly succeed on Counts II through IV of the Amended Supplemental Petition. However, as noted above, affidavits, exhibits, and the decision of the Board demonstrate that the claims lacked merit and the union acted in candid fairness. Thus, any claim based on bad faith or the meritorious quality of the grievance is vitiated.

Plaintiff has also noted that the union, by not representing him before the Board, somehow prejudiced him before the

Board by its conspicuous absence. The argument here is that, if the man's own union will not support him, neither will the Board. This position is without merit. First, at the time this Court remanded the case for *de novo* consideration before the Board, it was certainly not contemplated that the union would represent plaintiff before the Board. He was already represented by his present, very able counsel. The union, which was a party defendant in plaintiff's suit since 1971 and exposed to potential liability of $600,000, could hardly have represented plaintiff without a severe conflict of interest. Second, the claims were ultimately referred to an impartial referee when the Board became deadlocked. It is apparent that the plaintiff had the backing of his union in the voting, and thereby obtained the further benefit of the referee. Finally, as was implicit in this Court's remand order of May 4, 1976, the Court does not share plaintiff's suspicion of the Board's impartiality in a hearing where the union has refused to represent the plaintiff. Neither does the Supreme Court, for, as it stated in *Vaca v. Sipes,* 386 U.S. 171 (1967), "an order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved." *Id.* at 196. Here the union breach was never even established, and the plaintiff, for reasons stated in the May 4, 1976 order, received another hearing. Thus, plaintiff cannot now complain that the very relief he requested was inherently unfair, especially where he has neither alleged nor shown any particular facts to support his bias allegation. *See, Del Casal v. Eastern Air Lines,* 634 F.2d 295 (5th Cir. 1981), *reh. denied,* 638 F.2d 1234 (5th Cir. 1981).

Plaintiff complains, too, of litigation related activity engaged in by the union after May 4, 1976, including taking depositions of witnesses and disclosing information obtained from plaintiff. In the Court's opinion, these allegations are not even actionable. The union was defending itself in the lawsuit in which, as noted above, the potential exposure was $600,000. Moreover, the union, of necessity, needed depositions of witnesses before they became unavailable, through death or otherwise. These

allegations are, in essence, as BRAC points out, tantamount to alleging that defending a lawsuit is a breach of duty of fair representation, regardless of the merits of the claim and the good faith of the union. Such a position is untenable. *See, Vaca, supra,* 386 U.S. at 193. Accordingly, since there is no disputed issue of material fact, and plaintiff has failed to controvert in any way the affidavit and letters establishing union good faith, summary judgment for the union is proper on these counts.

C. The Motion for Summary Judgement of the C&EI on Counts II, III, IV and V of the First Amended Petition

As noted in section II above, the C&EI has also sought summary judgment on Counts II through V of the First Amended Petition, maintaining without elaboration that, if it prevails on Count I, the remaining counts must be dismissed. The C&EI has, of course, prevailed on Count I.

In *Vaca v. Sipes,* 386 U.S. 171, 186 (1967), the Supreme Court held that "The wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 186. In *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), the high court held that if employees can prove an erroneous discharge by the employer and the union's breach of duty of fair representation tainting the arbitration committee's decision, they are entitled to an appropriate remedy against the employer as well as the union. There is authority extending the rule of *Vaca* from the National Labor Relations Act context to that of the Railway Labor Act. *See, Schum v. South Buffalo Ry.,* 496 F.2d 328 (2d Cir. 1974); *see also, Hennebury v. Transport Workers,* 485 F.Supp. 1319 (D. Mass. 1980) (exhaustion requirement no

defense to actions against employer when wrongful union conduct is alleged to have caused employee to fail to process his grievance); *Pratt v. United Air Lines,* 468 F.Supp. 508 (N.D. Cal. 1978).

Assuming the action for wrongful discharge and wrongful disqualification lies against the employer under the Railway Labor Act when the union has allegedly violated its duty of fair representation, it cannot possibly succeed here. First, since the union has prevailed upon its Motion for Summary Judgment, the union breached no duty preventing plaintiff from adjudication of his underlying grievance. Second, and more importantly, plaintiff has had his underlying grievances adjudicated by the Board. Thus, the C&EI is corret in arguing that the remaining counts must fail. With respect to the claims for deprivation of third party beneficiary rights, the Court is aware of no authority supporting this novel theory. At any rate, plaintiff could hardly be third party beneficiary to a contract to which he is a party.

VI. Conclusion

In accordance with the above discussion, plaintiff's Motion (to file additional counts to supplemental petition) is hereby GRANTED; defendant BRAC's Motion for Summary Judgment is hereby GRANTED on all counts of both the First Amended Petition and the Amended Supplemental Petition, with the exception of Count I of each, and defendant C&EI's Motion for Summary Judgment is hereby GRANTED on all counts of both petitions. The action is hereby DISMISSED, and the Clerk shall enter judgments in defendants' favors.

Since the above disposes of the case in all respects, BRAC's Motion to Dismiss the Amended, Supplemental Petition is DENIED as moot.

IT IS SO ORDERED.

DATED: March 10, 1982

/s/ JAMES L. FOREMAN
Chief Judge

APPENDIX C

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

ORDER

FORM 2(a) To accompany Award Number 22697
Docket Number MS-22343

TO: Mr. Paul W. Peterson
c/o Mr. James B. Wham, Attorney at Law
Wham and Wham
212 East Broadway
P.O. Box 549
Centralia, Illinois 62801

The Division, after consideration of the docket identified above, has determined an award favorable to the petitioner(s) should not be made. The Claim(s) is (are) disposed of as set forth in the Award, a copy of which is attached and made part of this Order.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, the 11th day of January 1980.

Copy to: Mr. O.B. Sayers, Director of Labor Relations
Missouri Pacific Railroad Company
(former Chicago & Eastern Illinois Railroad Company)
210 North 13th Street
St. Louis, Missouri 63103

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William M. Edgett, Referee

Award Number 22697
Docket Number MS-22343

PARTIES TO DISPUTE: (Paul W. Peterson
(Missouri Pacific Railroad Company
((Former Chicago & Eastern Illinois
R.R.)

STATEMENT OF CLAIM:

CLAIM #1 (Disqualification)

(a) The Chicago & Eastern Illinois Railroad Company (hereinafter referred to as 'The Carrier' or 'C&EI'), violated the Agreement between the Carrier and the Transportation-Communications Employees Union, Rules 4, 24 and related rules, when it suspended Claimant, Paul W. Peterson, from his rightfully owned Telegrapher position at Wansford Yard Telegraph Office on December 23, 1964.

(b) The Carrier shall now be required to compensate Paul W. Peterson one day's pay (8 hours) for each day and every day that he is not permitted to work his position, plus any expenses incurred, beginning December 23, 1964.

CLAIM #2 (Dismissal)

(a) The Chicago & Eastern Illinois Railroad Company (hereinafter referred to as 'The Carrier' or 'C&EI'), violated and continues to violate the Agreement between the Carrier and the Transportation-Communications Employees Union, Rules

4, 24 and related rules, when on April 15, 1965, it severely and arbitrarily disciplined claimant, Paul W. Peterson, by removing him from the service of the Carrier.

(b) The Carrier shall now be required to reinstate Claimant, Paul W. Peterson, to his former status with seniority, vacation and all other rights intact and accordingly reimburse him for all wages lost beginning April 15, 1965."

OPINION OF THE BOARD:

This claim was decided by the Board in Award 15924 on October 31, 1967. An appeal was taken to the District Court of The United States for the Eastern District of Illinois. This Award follows proceedings at the Board taken at the direction of the Court. Both parties were ably represented at the hearing.

Claimant Peterson was dismissed from service with the former Chicago and Eastern Illinois Railroad Company after Carrier found him in violation of the Rules. He was found to be guilty of insubordination for his refusal to report for service after direct instructions from Carrier to do so. Claimant had been disqualified from his position of First Trick Telegrapher at Carrier's Wansford Yard. After the disqualification, Claimant did not make himself available for other service. He was given direct instruction by Carrier to mark up or present medical evidence supporting any claimed physical inability to perform service if he was not reporting for reasons of health.

When Claimant did not make himself available for service, or present a medical reason for his failure to do so, Carrier convened an investigation. Claimant did not contend that he could not work for reasons of health. His position was that he would only work the first shift position from which he had been disqualified. Faced with Claimant's refusal to report for service, after competent direction to do so, Carrier found Claimant insubordinate and dismissed him.

Clearly Carrier acted on a record which contained substantial evidence supporting the charge of insubordination. Its action was not arbitrary, capricious or discriminatory. One of the most basic tenets, at least the one most frequently encountered, in labor relations is "obey now, grieve later." As the Board views Claimant's disqualification, it was fully justified and taken in accordance with the Rules. However, assuming for the sake of discussion, that it was not, Claimant's recourse was to pursue a claim. He could not refuse to work. When Carrier directed him to make himself available for service he was required to do so. Reliance on asserted injustice and impropriety in his disqualification from the first trick telegrapher's position is misplaced. His recourse lay in the grievance procedure, not in self help. Nor is the asserted fact that he would not have received a monetary award in his claim for alleged improper disqualification a ground for refusing to work as Carrier directed him to do. To repeat, his recourse was to pursue his claim, he could not engage in self help.

The Board finds that Carrier had substantial grounds for disqualifying Claimant from the position of first trick telegrapher at Wansford Yard. It further finds that Claimant's refusal to perform service for Carrier, other than the position from which he had been disqualified, was insubordination and therefore Carrier had just cause for dismissing him from its service.

FINDINGS:

The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing theron, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1980.

APPENDIX D

Award No. 15924
Docket No. MS-16395

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

PAUL W. PETERSON

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

STATEMENT OF CLAIM: Within thirty days from the date of this letter, I will file in ex parte with your board, an unadjusted dispute existing between me and the Chicago and Eastern Illinois Railroad.

On Dec. 23rd, 1964 at 2:45 P.M., the C&EIRR unexpectedly and without forewarning, lifted me from my first trick telegrapher position at Wansford Telegraph office, Evansville, Ind. and banned me from that particular position under the guise of disqualification.

Subsequent events, which ran from Dec. 23rd, 1964 until April 15, 1965, clearly indicate that the Carrier officials were not disposed to viewing my side of the story with even a reasonable amount of fairness before rendering a decision, and the Carrier did not at any time, before or after, make any real or concerted effort to delve into the Wansford side of the story, etc.

This is further complicated by the fact that the Order of Railroad Telegraphers did a cursory yeoman baywindow check

and as I understand it, carried the case under the Railway Labor Act, up to the Chief Operating Officer of the Carrier before they decided to pull out of the picture.

Therefore, in view of the above, my claim is based on one of the oldest principles of justice or the right of the individual to have his side of the story brought completely to light and then let justice be meted out — where it is due. Also any other rights that might be my due which were violated on Dec. 23rd, 1964, according to Union rules or their agreement procedure.

I expect the Carrier to return me to my former position, no strings attached, with all rights intact and reimbursement for all wages lost from Dec. 23rd, 1964, when I was notified it wouldn't be necy [sic] to put in an appearance on first trick the next morning, to date of reinstatement.

OPINION OF BOARD: Claimant was removed from his position as the first trick telegrapher at the Wansford Telegraph office, Evansville, Indiana on December 23, 1964 on the basis of disqualification resulting from his refusal to perform duties in the manner prescribed by the Carrier. Ultimately, the Claimant was dismissed from the service of Carrier on April 15, 1965 for failure to protect his seniority by accepting extra work from Carrier's extra board, where he was assigned following disqualification from his former assignment.

Initially, Claimant contends that Carrier violated the applicable Agreement between the Carrier and the Order of Railroad Telegraphers by disqualifying him from service on December 23, 1964. The record discloses that the disputed action of the Carrier was contested and appealed to the highest designated officer, who declined said appeal on February 16, 1965. Claimant did not file the instant claim with this Board until May 5, 1966. It is well established that such an appeal from the decision of the highest designated officer of a Carrier must be filed within nine (9) months from the date of denial in accordance with Article V of the National Agreement dated Aug-

ust 21, 1954. Accordingly, that portion of the instant claim arising out of Claimant's disqualification as first trick telegrapher at the Wansford Yard is barred and must be dismissed.

Claimant also challenges Carrier's authority to dismiss him from service for failure to protect his seniority by accepting other work offered him while he was assigned to Carrier's extra board. A careful examination of the record fails to disclose any probative evidence in support of the Claimant's position that carrier has abused its authority by acting in an arbitrary, capricious or discriminatory manner. Therefore, we must conclude that Carrier's action was neither unreasonable under the circumstances nor a violation of any provision of the applicable Agreement. The claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railroad Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim is denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S.H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1967.

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 10, 1983

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER,, Circuit Judge

JUDGMENT — ORAL ARGUMENT

Paul W. Peterson,

Petitioner-plaintiff-appellant,

No. 82-1895

vs.

Chicago and Eastern Illinois Railroad Company,
Transportation-Communication Employees Union,
System Division No. 34 and
Transportation-Communications Division, Brotherhood of
Railway, Airline and Steamship Clerks, Freight Handlers,
Express and Station Employees,

Respondents-defendants-appellees.

Appeal from the United States District Court
for the Southern District of Illinois,
East St. Louis Division.

No. 68 C 99

Judge James L. Foreman

This cause was heard on the record from the United States District Court for the Eastern District of Illinois, East St. Louis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

APPENDIX F

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 21, 1983

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER,, Circuit Judge

Paul W. Peterson,

Petitioner-plaintiff-appellant,

No. 82-1895

vs.

Chicago and Eastern Illinois Railroad Company,
Transportation-Communication Employees Union,
System Division No. 34 and
Transportation-Communications Division, Brotherhood of
Railway, Airline and Steamship Clerks, Freight Handlers,
Express and Station Employees,

Respondents-defendants-appellees.

Appeal from the United States District Court
for the Southern District of Illinois.

No. CV 68-99

James L. Foreman, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Paul W. Peterson, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX G

Section 3 of the Railway Labor Act, 45 USC § 153 (1934)

First. There is established a Board to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such com-

pensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 151a and section 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at

any place designated by the division: *Provided, however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effec-

tive and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division

may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve

disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the

representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.